IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 12, 2008 Session

JOHNNY R. OWNBY ET AL. v. TENNESSEE FARMERS COOPERATIVE CORPORATION, U.S.A.

Appeal from the Circuit Court for Rutherford County
No. 51352 Don R. Ash, Judge

No. M2008-00878-COA-R3-CV - Filed May 18, 2009

This wrongful death action arises out of an accident at an agricultural facility: a worker fell through a skylight on the roof while employed by a company hired by the agricultural facility owner to do work on the roof. The trial court denied the owner's motion for a directed verdict on the question of whether the owner owed a duty of care to the injured worker. We reverse the decision of the trial court because we have concluded that this case falls within an exception to the general duty of a landowner to provide a reasonably safe workplace.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Van French, Murfreesboro, Tennessee, for the appellant, Tennessee Farmers Cooperative, Corporation, U.S.A.

J. Stanley Rogers and Christina Henley Duncan, Manchester, Tennessee, for the appellees, Johnny Ownby and wife, Robin L. Ownby, individually and as next of kin and natural parents of Michael Paul Ownby, deceased.

OPINION

Tennessee Farmers Cooperative Corporation, U.S.A. ("TFC"), a wholesale agricultural company, has its principal place of business in LaVergne, Tennessee. TFC hired Burns Maintenance Services, Inc. ("BMS") to perform some work on the roof of a train shed adjoining a warehouse at its facility in LaVergne. The shed's metal roof contained large fiberglass skylights. The invoice for the job gives the following description: "furnish labor to coat roof, install skylights, fab and install gutter and assist with jib crane as per instructions."

TFC's maintenance manager, Larry Williams, met with Mr. Burns, one of the owners of BMS, and a BMS employee about the work to be done on the shed's tin roof. Williams gave the following testimony as to his instructions to BMS about the work he wanted done:

> A. I told Mr. Burns I wanted to fix and repair any leaks, paint the roof, the structural outside didn't look really good. We wanted to try to spruce it up a little bit. I was concerned about the roof. I had not been on it. No one I know of has for years. I had places on the tin that looked they were possibly bad, which it turned out they were not. I showed him but I was concerned. I wanted to make sure all safety–if we had to get a lift, put a net underneath them, whatever we had to do in order to be sure everybody was safe on the roof, because I was not familiar with it. That's why I hired Mr. Burns to do that. They assured me they would take all precautions to do that.
> . . . .
>
> Q. What, if anything, did you say to Mr. Burns about the scope of work he was to do?
>
> A. I told him I wanted the tin painted or replaced if it needed it, skylights if they had leaks, which one of them did for sure. I wanted it replaced or repaired.
> . . . .
>
> Q. When you told him that it was not–you had not been up there, didn't know the full scope, tell the jury whether or not you asked him to make any determination if any further repairs were needed?
>
> A. I did tell Mr. Burns whatever he found up there if it needed to be repaired to repair it.

Mr. Williams further testified that he had worked at TFC for about three years at the time of the accident and that no one from TFC had been on the roof during that time. TFC's standard operating procedures for contractors hired by the company included a requirement that the contractors "[u]se fall protection for workers four feet or greater above approved working surfaces (guardrails or Class III harness with life line)."

Michael Paul Ownby, age 24, had been working for BMS for about 13 days at the time of the accident. Ownby and a more experienced co-worker, Timothy Blackburn, worked at TFC's facility for several days in July 2004. They painted or coated the roof and replaced four panels on one of the fiberglass skylights. On July 13, 2004, Ownby and Blackburn were replacing the gutter between the shed's roof and the adjoining warehouse, a taller structure. It is undisputed that Ownby and Blackburn both knew that they were not to walk on the skylights. While the two men were working on the roof, Ownby fell through a skylight; he was found under a train car on the shed floor about twenty feet below. Ownby died a few hours later as a result of his injuries. The skylight through

which Ownby fell was not the one for which he and Blackburn had replaced panels. There were no screens or guardrails around the roof's skylights.

Michael Ownby's parents, Johnny and Robin Ownby, filed this wrongful death action against TFC in February 2005. The complaint alleges that TFC was negligent in "[f]ailing to provide Michael Paul Ownby with a safe place to perform his employment duties," "[f]ailing to adequately maintain and repair the roof and skylight portion of the overhead canopy structure," "[c]ontinuing to utilize the overhead canopy structure for business purposes during the maintenance work," and "[f]ailing to provide Michael Paul Ownby with safe alternative means in which to perform his employment duties."

The case was tried before a jury on January 15 to 18, 2008. At the end of the plaintiffs' proof, TFC moved for a directed verdict on the ground that TFC had no duty to provide a safe workplace for Michael Ownby as he was injured while performing the very repairs that BMS had contracted with TFC to perform. The trial court took this motion under advisement until the close of all of the proof, at which point the court denied the motion.[1] The jury found Ownby to be 40% at fault and TFC 60% at fault with total damages in the amount of $150,000. On February 13, 2008, the trial court entered judgment on the verdict, awarding the plaintiffs a judgment against TFC in the amount of $90,000. The trial court denied TFC's motion for judgment notwithstanding the verdict or for a remittitur.

On appeal, TFC argues that the trial court erred (1) in denying its motion for a directed verdict on the issue of its lack of duty to Ownby, (2) by excluding evidence concerning the results of an investigation by the Tennessee Occupational Safety and Health Administration ("TOSHA"), and (3) by denying TFC's motion for a directed verdict and motion for a remittitur on the ground that the plaintiffs failed to meet their burden of proving the pecuniary value of Ownby's life.

STANDARD OF REVIEW

In reviewing a trial court's denial of a motion for directed verdict, we must "take the strongest legitimate view of the evidence in favor of the non-moving party," construe all evidence in favor of the non-moving party, and disregard any countervailing evidence. *Johnson v. Tenn. Farmers Mut. Ins. Co.*, 205 S.W.3d 365, 370 (Tenn. 2006). A directed verdict should not be granted unless "reasonable minds could reach only one conclusion from the evidence." *Id.* Because the proper disposition of a motion for directed verdict involves a question of law, we review the trial court's decision de novo without a presumption of correctness. *Gaston v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815, 819 (Tenn. 2003); *Duran v. Hyundai Motor Am., Inc.*, 271 S.W.3d 178, 206 (Tenn. Ct. App. 2008).

[1] TFC also moved for a directed verdict with respect to several aspects of damages; these motions are not at issue in this appeal.

ANALYSIS

We must determine whether the trial court erred in declining to grant a directed verdict in TFC's favor on the question of whether TFC owed a duty of care to Ownby. Taking the strongest legitimate view of the evidence in favor of Ownby, we have concluded that the trial court erred in failing to grant a directed verdict because TFC owed no duty of care to Ownby under an exception to the general rules of premises liability related to independent contractors.

Under Tennessee law, a premises owner has a duty to "'exercise reasonable care to see that the [independent contractor's] employee has a reasonably safe place in which to work.'" *Inman v. Aluminum Co. of Am.*, 697 S.W.2d 350, 353 (Tenn. Ct. App. 1985) (quoting *Dempster Bros., Inc. v. Duncan*, 452 S.W.2d 902, 906 (Tenn. Ct. App. 1969)). This general duty includes the responsibility for removing or warning the independent contractor of hidden or latent dangers of which the owner knew or with reasonable diligence would have known. *Eaton v. McLain*, 891 S.W.2d 587, 594-95 (Tenn. 1994). The property owner's duty of care to the independent contractor "'arises out of his superior knowledge of the dangerous condition of his premises.'" *Inman*, 697 S.W.2d at 353 (quoting *Dempster Bros.*, 452 S.W.2d at 906).

There is an important exception to the general rule of a property owner's duty to an independent contractor, as set out by this court in *Shell Oil Co. v. Blanks*:

> An exception to the general rule is recognized where the risks arise from, or are intimately connected with, defects of the premises or of machinery or appliances located thereon which the contractor has undertaken to repair. As to contracts for such repair work, it is reasoned that the contract is sufficient in itself to impart notice of a defect, the extent of which the repairman must discover for himself.

Shell, 330 S.W.2d 569, 571 (Tenn. Ct. App. 1959) (citation omitted). In *Shell*, an employee of an independent contractor hired to do painting at a gasoline filling station was injured when a steel pole he was painting gave way. *Id.* at 570. Some time prior to the accident, a bolt and tap that kept the pole from bending had become defective and were replaced with smooth wire wrapped around the pole to keep it from tipping over. *Id.* When the pole was painted each year, the wire was painted over so that it blended with the pole. *Id.* at 571. After discussing the principles of premises liability and the exception quoted above, the court concluded that the exception did not apply because the worker was hired to paint the pole, not to repair it, and there was "nothing in the contract to imply the existence of a defect or a danger to be avoided." *Id.* at 572. The court essentially found that the defect that caused the worker's injuries was separate and distinct from the condition the independent contractor was hired to address. *Id.*

In a later case, *Blair v. Campbell*, our Supreme Court applied the exception described in *Shell* to a case involving an independent contractor injured while repairing the property owner's roof. *Blair*, 924 S.W.2d 75, 77 (Tenn. 1996). The owner asked the independent contractor to repair a porch roof that was leaking. *Id.* The independent contractor fell to the ground when the rotten wood

supporting a gutter collapsed, causing a ladder propped against the gutter to turn. *Id.* at 76. In concluding that this case fell within the exception enunciated in *Shell v. Blanks*, the Court stated:

> Although Blair [the independent contractor] was not told of the extent of the damage to the roof, and perhaps could not have known until he climbed the ladder, it is immaterial under *Blanks*: the repair contract itself is sufficient to put the contractor on notice of a defect in the premises, and it is the contractor's responsibility to determine the extent of the defect.

Id. at 77.

Viewing the facts in this case in the light most favorable to the plaintiffs, we must conclude that the *Blair* exception applies. According to the invoice, TFC hired BMS to coat the roof, install skylights and gutters, and assist with the jib crane. Mr. Williams, TFC's maintenance manager, instructed BMS to make any needed repairs. It is undisputed that the skylights were obvious dangers and that Michael Ownby and Mr. Blackburn knew that they were not to step on the skylights. BMS and its employees were tasked with repairing the roof and skylights. The work that Ownby and Blackburn did on the roof required them to check the condition of the skylights, to repair them as needed, and to navigate around them in order to do the guttering and coating. Under the circumstances, the risks that caused Michael Ownby's death arose from or were "intimately connected with" the defects that BMS undertook to repair. *Shell*, 330 S.W.2d at 571. Therefore, TFC had no duty to protect BMS and its employees from the risks associated with stepping on the skylights.

The plaintiffs argue that, pursuant to regulations of the Occupational Safety and Health Administration ("OSHA"), TFC was required to install screens or protective guardrails around the skylights and that its failure to do so constituted negligence. We find this argument to be without merit. Under Tennessee case law, violation of a state or federal regulation constitutes negligence per se if the injured party is a member of the class of persons the regulation was designed to protect. *See Bellamy v. Fed. Express Corp.*, 749 S.W.2d 31, 35 (Tenn. 1988)*; Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 802 (6th Cir. 1984). In *Ellis v. Chase Communications, Inc.*, the Sixth Circuit was confronted with a similar issue under Tennessee law. *Ellis*, 63 F.3d 473 (6th Cir. 1995). The decedent in *Ellis* fell to his death while painting the defendant's television tower. *Id.* at 475. In rejecting the plaintiffs' theory that an alleged OSHA violation by the defendant constituted negligence per se, the court noted that there was "no evidence that the television tower . . . is a regular job site on which Chase had a duty to protect its own employees." *Id.* at 478. The court reasoned that, "in regard to the tower, Chase was no different than a property owner hiring a contractor to perform work on its property." *Id.* The same reasoning applies in our case. There is no dispute that TFC employees did not work on the roof. Williams testified that no one from TFC had been on the roof during his three years with the company prior to the accident.

Moreover, the OSHA regulation upon which the plaintiffs rely in this case, 29 C.F.R. § 1910.23, does not apply to TFC's skylights.[2] This regulation appears in Part 1910 of Title 29, which contains the general industry safety standards. *Brock v. Cardinal Indus., Inc.*, 828 F.2d 373, 376 (6th Cir. 1987), *overruled on other grounds in Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150 (1991). Under the OSHA regulatory scheme, the general industry standards apply to a working situation unless preempted by industry-specific standards. *Id.* at 376. There are, however, specific standards applicable to the construction industry at Part 1926 of Title 29. *Id.* 29 C.F.R. § 1910.12(a) provides that Part 1926 applies "to every employment and place of employment of every employee engaged in construction work." "Construction work" is defined as "work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1910.12(b). Since BMS and its employees were engaged in repair work, the construction safety standards would control in this case.[3]

Even if we assume that 29 C.F.R. § 1910.23(a)(4) would otherwise apply to TFC, the regulation, by its plain language, would not impose any obligation upon TFC with respect to the roof skylights. The regulation is found in Part 1910, Subpart D, which addresses "Walking-Working Surfaces." The specific provision cited by the plaintiffs is part of 29 C.F.R. § 1910.23, which concerns "Guarding floor and wall openings and holes," and appears in subsection (a), which concerns "Protection for floor openings." 29 C.F.R. § 1910.23(a)(4) states: "Every skylight floor opening and hole shall be guarded by a standard skylight screen or a fixed standard railing on all exposed sides." By its terms, this provision applies to skylights found in floors, not roofs. The applicable definitions of "floor hole" and "floor opening" at 29 C.F.R. § 1910.21(a) do not indicate an intent to include roofs.[4] We must conclude, therefore, that 29 C.F.R. § 1910.23(a)(4) did not require TFC to install screens or railings around the roof skylights in this case. *See Diamond Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 648 (5th Cir. 1976) (discussing why a roof is not a floor in the context of another OSHA regulation).

---

[2]Each side had an expert witness who testified about the OSHA regulations. Dr. Cox, the plaintiffs' expert, opined that 29 C.F.R. § 1910.23 required TFC to install a railing or screen around the skylights. The interpretation of a federal regulation is, however, a legal question and not a proper matter for opinion testimony. *See Garcia v. Norfolk S. Ry. Co.*, 266 S.W.3d 917, 928 (Tenn. Ct. App. 2008); *Merrill v. Knauf Fiber Glass*, 771 N.E.2d 1258, 1263 (Ind. Ct. App. 2002).

[3]29 C.F.R. § 1926.501(b)(4) provides that "[e]ach employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes." There is no dispute that these safety obligations were the responsibility of Michael Ownby's employer, BMS, not TFC.

[4]"Floor hole" is defined as "[a]n opening measuring less than 12 inches but more than 1 inch in its least dimension, in any floor, platform, pavement, or yard, through which materials but not persons may fall; such as a belt hole, pipe opening, or slot opening." 29 C.F.R. § 1910.21(a)(1). A "platform" is defined as "[a] working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment." "Floor opening" is "[a]n opening measuring 12 inches or more in its least dimension, in any floor, platform, pavement, or yard through which persons may fall; such as a hatchway, stair or ladder opening, pit, or large manhole."

CONCLUSION

For these reasons, we have determined that TFC did not have a duty to protect BMS and its employees from the risks that caused Michael Ownby's death. Because of this conclusion, we need not address any of the other issues presented on appeal. We reverse the decision of the trial court and direct that a verdict in favor of TFC be entered in this case.

Costs of appeal are assessed against the appellees, for which execution may issue if necessary.

_____

ANDY D. BENNETT, JUDGE